

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT EDWARD McCONNON a/k/a SCOTT  
EDWARD MOSHER,

Defendant-Appellant.

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UNPUBLISHED

February 18, 2000

No. 209063

Newaygo Circuit Court

LC No. 96-006318-FC

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,\* JJ.

ZAHRA, J. (concurring in part and dissenting in part).

I concur in the portion of the majority's opinion affirming defendant's conviction for CSC II and respectfully dissent from the portion of the majority's opinion that reverses and vacates defendant's conviction for CSC III. I agree with the majority that the trial court erred in instructing the jury regarding the charge of CSC III and that this error was plain or obvious error. However, I respectfully disagree with the majority's interpretation of *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), and the conclusion that *Carines* left unfettered the definition of prejudice arising from plain instructional error espoused by a plurality of the Supreme Court in *People v Vaughn*, 447 Mich 217, 238; 524 NW2d 217 (1994).

In *Carines*, *supra* at 763-764, the Supreme Court, relying on *United States v Olano*, 507 US 725; 113 S Ct 1170; 123 L Ed 2d 508 (1993), set forth stringent standards to be applied by this Court before setting aside a conviction on a claim of unpreserved instructional error:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an

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\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “ ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [footnote and citations omitted].

Reversible error does not exist merely because, as found by the majority, the jury might have reached a different conclusion had it been properly instructed. *Id.* Reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra* at 763.

In this case, defendant testified that he went to the complainant’s home at approximately 3:45 a.m. where they later exchanged words and had an argument. Defendant testified complainant “kind of came at me like she was going to do something, or tried to hit me, or something like that. She just came at me like she was going to attack me.” Defendant testified that in response to the alleged aggressive conduct of the complainant, he pushed her to the floor and she hit the corner of the wall. Defendant testified that he had absolutely no sexual contact with complainant.

Conversely, complainant testified that she went to bed about 2:00 a.m. on the night in question. She lived on an upper level of an apartment building and while she locked the front door she left her windows and balcony door unlocked. Complainant was awakened from her sleep by defendant, who got her out of her bed and in her hallway. Defendant threw her down on the floor where she landed on her stomach. Defendant was laying on complainant’s back and rubbing his pelvic area into her buttocks while holding his hand over her mouth so tightly that she felt like she could not breathe or scream.. Defendant’s hand muffled complainant’s screams. Defendant removed his belt and pulled down his pants before he turned complainant onto her back. When the prosecutor asked for more details about the offense, complainant testified:

A. He lifted up my shirt. He was pulling my face like this (indicating) real tight, and he was kissing me. Then he pulled my shirt up and put his mouth on my breast and his hands on my breast and he kissed me through my underwear.

Q. Where?

A. On my vagina. [Tr I, 164.]

Complainant’s trial testimony differed from statements made to the police after the incident, where complainant characterized defendant as “forcing oral sex on her.” She said that she struggled with defendant during this time (Tr I, 164).

Defendant let complainant get up from the floor when one of her two children started crying, and she went into the bedroom while defendant went into the living room. Complainant tried to get defendant out of the apartment without leaving her children with him; she did not have a telephone. After getting her crying child, she went to the kitchen where defendant was seated. Complainant asked

defendant why he was doing this. The second child then walked into the kitchen and defendant instructed her to lock the children in her bedroom. As complainant put one child to bed, she stomped her foot on the floor to get her lower level neighbors attention. Defendant became upset and “threw” one child on complainant. Complainant was holding her child while sitting on the bed when defendant lifted her legs and removed her underwear. Complainant tried to fight back by kicking, but she was afraid of hurting her child. Defendant grabbed the child, took her out of the room and upon return to the bedroom “dropped his pants again,” and removed her shirt. Complainant testified that defendant “tried[d] to stick his penis” in her vagina, but could not penetrate her because he did not have an erection. Complainant could not stop defendant because she was exhausted from the struggle and she did not scream because she was afraid of upsetting her children and defendant. Thereafter, defendant put on his pants, threw her shirt at her, and left the apartment through the front door.

The prosecutor’s theory was that defendant’s specific acts constituted different degrees of criminal sexual conduct. The prosecutor argued that when defendant “kissed” complainant over her underwear, he attempted to commit CSC I; when defendant removed complainant’s shirt and touched her breasts, he committed CSC II; and when defendant removed complainant’s underwear and attempted to penetrate her, he attempted to commit CSC III. The jury verdict of acquitting defendant on the attempted CSC I charge but convicting defendant on the charge of CSC II and attempted CSC III demonstrates that the jury found complainant’s version of the assault credible and rejected defendant’s assertion that he did not commit any sexual assault and that he had no sexual contact with complainant. The acquittal on the charge of attempted CSC I does not undermine complainant’s credibility. Complainant never testified that defendant performed or attempted to perform an act of cunnilingus on her. The jury appears to have concluded that the touching of clothing described by complainant at trial as “kissing” over her underpants did not amount to penetration or attempted penetration as required to convict under CSC I.

However, because the jury’s verdict demonstrated a rejection of defendant’s testimony and an acceptance of complainant’s testimony, I cannot find that the instructional error committed by the trial court was outcome determinative or resulted in the conviction of an innocent person. Complainant’s testimony satisfied all of the elements of attempted CSC III.

I also cannot find that the error seriously undermined the fairness and integrity of the judicial proceedings. In reaching this conclusion I am again guided by *Carines, supra* at 773, which quoted from the United States Supreme Court’s holding in *Johnson v United States*, 520 US 461, 470; 117 S Ct 1544; 137 L Ed 2 718 (1997):

On this record there is no basis for concluding that the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” Indeed, it would be the reversal of a conviction such as this which would have that effect. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” R. Traynor, *The Riddle of Harmless Error* 50 (1970).

Because the record in this case clearly suggests that the instructional error did not impact the proceedings, I cannot find that the error seriously affected the fairness, integrity or public reputation of these proceedings. I would therefore affirm defendant's convictions on all counts.

/s/ Brian K. Zahra